No. 02-200

IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER and CHRISTOPHER M. THOMAS,

Appellees,

-and-

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Intervening Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MOTION OF INTERVENING DEFENDANTS/ APPELLEES TO DISMISS OR AFFIRM

MICHAEL A. CARVIN
JONES, DAY, REAVIS & POGUE
51 Louisiana, NW
Washington, D.C. 20001
(202) 879-3939

PETER H. ELLSWORTH
Counsel of Record
JEFFERY V. STUCKEY
SUSAN G. SCHWOCHAU
DICKINSON WRIGHT PLLC
215 S. Washington Square
Suite 200
Lansing, MI 48933
(517) 371-1730

Attorneys for Intervening Defendants/Appellees

176481

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a challenge to an enacted congressional districting plan where Appellants allege that the plan dilutes the votes of individuals who prefer to vote for Democratic candidates.

2. Whether Appellants have standing to assert that an enacted congressional districting plan violates the Equal Protection Clause because political party preference was the predominant factor used to define district lines, where Appellants reside in districts alleged to be safe districts for their preferred political party, in districts alleged to be competitive, or districts in which elected members of Congress are alleged to listen to their constituents regardless of the constituent's political party affiliation.

3. Whether this Court should summarily affirm the district court's dismissal of an equal protection claim alleging a congressional districting plan reflects unconstitutional political gerrymandering where Appellants allege disproportionate representation, but fail to allege other indicia of a denial of fair representation.

4. Whether this Court should summarily affirm the district court's dismissal of an equal protection claim alleging that political factors predominated over traditional districting criteria in a state legislature's adoption of a congressional districting plan.

5. Whether this Court should summarily affirm the district court's dismissal of a challenge to a congressional districting plan brought under Article I, § 2 or § 4 of the U.S. Constitution, where that plan meets Article I's equality of population requirement.

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Pursuant to Supreme Court Rule 18.6, the Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske (Appellees herein and Intervening Defendants below), move to dismiss the present appeal for lack of jurisdiction or, in the alternative, to affirm the district court's judgment dismissing Appellants' claims as that judgment is the only proper result under the Court's jurisprudence and thus no further briefing or oral argument is required.

I. STATEMENT OF THE CASE

A. Facts Relevant To This Motion

Appellants, voters who prefer to vote for Democratic candidates, challenge the Michigan Legislature's enacted congressional districting plan[1] because they predict that this plan will yield one or two more Republican seats than most of their proffered alternative plans.

As Appellants assert in their complaints, Michigan is a politically competitive state. (J.S. App. 43a; Motion App. 19a, ¶ 42).[2] At various times in the state's history, the electorate has favored Democratic and Republican presidential candidates. (J.S. App. 44a; Motion App. 20a, ¶ 44). At the time the 2000

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1. A map depicting the congressional districts defined by the Michigan Legislature is attached. (Motion App. 1a). This map is available at http://www.state.mi.us/census2000/2000_districts/congress_state.pdf.

2. "J.S. App." refers to the Appendix attached to Appellants' Jurisdictional Statement ("J.S."). Intervening Defendants attach a copy of Appellants' Amended Complaint because the Amended Complaint that Appellants included in their Appendix (J.S. App. 52a-73a) *is not the same document that was filed in the district court.* In comparison to the filed version, the document attached to Appellants' Jurisdictional Statement excludes a number of fundamental assertions (*e.g.*, that Michigan is a politically competitive state, *see* Motion App. 19a, ¶ 42), has different wording within several paragraphs, and is signed by a different attorney.

census was released, Michigan sent to Washington two Democratic senators, nine Democratic representatives, and seven Republican representatives. (J.S. App. 43a; Motion App. 19a, ¶ 42). Michigan voters had elected sufficient Republican senators and representatives to the state's legislature, on the other hand, so as to give Republicans a majority of seats in each house of that body. (J.S. App. 31a; Motion App. 7a, ¶ 16).

As the Michigan Legislature found, upon release of the 2000 census it became clear that Michigan's congressional district lines would need to be redefined. Michigan's population had grown over the prior decade, but not as much as other states' populations. Thus Michigan was allotted one fewer representative. The population's growth occurred in Detroit's outer suburbs and in the northern portions of the Lower Peninsula; Detroit itself lost population. The new data meant that Michigan's districts were no longer in compliance with Article I, § 2's equality of population requirement. House Concurrent Resolution 34 ("HCR 34"), 2001 Journal of the Michigan House 1382-1384 (No. 58, July 10, 2001), (Motion App. 28a).

Michigan Senate Bill 546 was introduced on June 14, 2001. 2001 Journal of the Michigan Senate 736 (No. 55, June 14, 2001). After a June 25, 2001 hearing, the Senate Committee on Reapportionment reported the bill to the Senate floor. 2001 Journal of the Michigan Senate 1063 (No. 56, June 26, 2001). The full Senate voted in favor of the bill on June 26, 2001. *Id.* at 833. The House Committee on Redistricting and Elections met on July 10, 2001 to consider SB 546. That Committee voted in favor of SB 546 on July 10, 2001. 2001 Journal of the Michigan House 1390 (No. 58, July 10, 2001). The full House took up consideration of SB 546 on July 11, 2001, and thereafter passed the bill. The House also adopted HCR 34, which explained SB 546 and urged the Governor to sign the bill.

2001 Journal of the Michigan House 1562, 1568 (No. 59, July 11, 2001).[3]

In its consideration of SB 546, the House rejected the two plans proposed by Democratic representatives. *See id.* at 1518, 1561-62. The Legislature viewed the adopted plan as "most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature." (Motion App. 37a). The "statutory redistricting criteria" that the Legislature followed were those presented in the Congressional Redistricting Act of 1999 ("CRA"). Mich. Comp. Laws Ann. § 3.63; (J.S. App. 74a-76a). In addition to language tracking requirements imposed by federal law (*e.g.*, Article I's equality of population mandate), the CRA set forth "secondary" guidelines such as contiguity, breaking as few county boundaries "as is reasonably possible," and breaking as few city and township boundaries "as is reasonably possible." (J.S. App. 74a-75a). The CRA's secondary guidelines were similar to both the criteria used by the Michigan Supreme Court for redistricting the state legislature in 1982 and 1992, and the criteria used by the federal court in drawing Michigan's congressional district lines in 1992. (Motion App. 29a).

After passage of SB 546 by both houses, a technical error was discovered: two census tracts in District 15 were omitted from that District's legal description. Senate Secretary Carol Morey Viventi, in accordance with authority delegated to her by Rule 12 of the Joint Rules of the Michigan House and Senate, made an appropriate technical correction to SB 546 in order to include those two census tracts in District 15's description. *LeRoux v. Secretary of State*, 465 Mich. 594, 640 N.W.2d 849, 860 (2002) (per curiam) (concluding that Secretary Viventi's correction "implemented the clear intent of the Legislature that

3. The Senate also adopted HCR 34. 2001 Journal of the Michigan Senate 1219 (No. 58, July 11, 2001).

the tracts be included in [District 15] and does not invalidate the statute."). Upon presentment, the Governor signed the bill, which, as 2001 PA 115, was then filed with the Secretary of State on September 11, 2001. 2001 Journal of the Michigan Senate 1549, 1558 (No. 60, Sept. 19, 2001).

On October 17, 2001 — after 2001 PA 115's enactment and more than three months after the Legislature deliberated and voted on a new congressional districting plan — Democrats sought to reopen the entire issue of congressional district lines by introducing yet another proposed plan (Appellants' "Second Alternative Plan"). Dealing with other matters at the time, the Legislature understandably did not reopen an issue it had already decided.

B. Procedural History And Decision Below

Appellants filed their initial complaint challenging the constitutionality of 2001 PA 115 (the "2001 Plan") on July 11, 2001. That complaint, which included six claims of constitutional and statutory violations (and a seventh claim that § 1983 was violated), was never served. Appellants filed their Amended Complaint on September 20, 2001, and finally served Defendants on November 7, 2001.

A second set of plaintiffs, also represented by Appellants' counsel, initiated on November 6, 2001 a challenge to the 2001 Plan in the Michigan Supreme Court, contending that the Plan violated the CRA and the Michigan Constitution.[4] The Michigan Supreme Court in *LeRoux v. Secretary of State*, 465 Mich. 594, 640 N.W.2d 849, rejected those challenges.

In an obvious effort to have this Court view with suspicion the Legislature's enactment of the 2001 Plan, Appellants assert

4. The Michigan Legislature in 2001 also enacted plans defining state legislative districts. Those districts have not been challenged in either the state or federal courts.

facts negated by the *LeRoux* decision. First, the Legislature intended to follow, (J.S. App. 77a; Motion App. 29a-35a, 37a), and did follow the CRA's neutral guidelines. The *LeRoux* plaintiffs put forth the same arguments as Appellants do here regarding how the CRA's secondary guidelines were "violated." *See LeRoux*, 640 N.W.2d at 861. The Michigan Supreme Court concluded that the Legislature was not bound by the CRA's secondary guidelines, and thus plaintiffs had no claim. *Id.* This conclusion means, contrary to Appellants' assertions (*e.g.*, J.S. at 5), that the Michigan Legislature could in no way "violate" the CRA's nonbinding guidelines.

Second, Appellants repeatedly assert that the Legislature enacted the CRA's guidelines twice — once in 1999 and again in 2001. (J.S. at 6, 11, 24). This assertion also was put before the Michigan Supreme Court, with plaintiffs contending that the Legislature was bound by the CRA's secondary guidelines because it had re-enacted or otherwise incorporated those guidelines within 2001 PA 115. *See* 640 N.W.2d at 861-62. The Michigan Supreme Court flatly rejected this argument, holding that 2001 PA 115 "does not incorporate the 1999 guidelines as an enforceable provision of 2001 PA 115 that would permit review of the redistricting plan adopted by that statute. Rather, [Mich. Comp. Laws Ann. § 3.54(a)] is merely part of the Legislature's explanation of the principles it used in developing the plan." *Id.* at 861-62. As the *LeRoux* Court noted, the Legislature's "choice to consider those principles [historically used by courts in cases of legislative impasse] does not signal an intention to convert the nonbinding guidelines into a rigid test under which the plan can be challenged by anyone who claims that some other plan better meets the guidelines." *Id.* at 863.

Finally, Appellants describe the *LeRoux* Court as divided along party lines in its judgment with respect to the validity of

the 2001 Plan's enactment. (J.S. at 7). Putting aside any meaning to be ascribed to this assertion, this is a patently untrue statement. A split among the Justices occurred on the issue of whether Secretary Viventi's correction violated the Michigan Constitution. Five Republican Justices concluded that it did not; Justice Cavanagh, a Democrat, wrote separately and concurred in the result; and Justice Kelly, a Democrat, dissented.[5]

After the Michigan Supreme Court decided *LeRoux*, the district court established an expedited discovery and briefing schedule. In accordance with that schedule, on April 19, 2002, Defendants and Intervening Defendants moved that each of the Appellants' claims be dismissed under Rule 12(b)(1) or Rule 12(c).

Consistent with the standard that Rule 12(b)(1) and Rule 12(c) requires a court to apply, the lower court viewed the allegations in Appellants' Amended Complaint as true and interpreted any ambiguities in Appellants' favor. Contrary to what Appellants suggest (*e.g.*, J.S. at 6 ["the 2001 Plan's enactment was, in the District Court's words, marked 'by a host of procedural defects'"]), the district court made no findings.

Appellants' description of the district court's statement of the assumed facts is often inaccurate and incomplete. For example, the district court did not, as Appellants suggest, find evidence of "'abundan[t]' disproportionality between votes and seats," (J.S. at 8); it noted only that Appellants had "alleged disproportionality in abundance." (J.S. App. 14a). The district court's reference to "a host of procedural defects" came in the following sentence: "In addition to the purported deficiencies

5. Neither Justice Cavanagh (concurring in result) nor Justice Kelly (dissenting) spoke in opposition to the conclusion that the Legislature was not bound by the CRA's secondary guidelines.

laid out above, plaintiffs claim the challenged plan's legitimacy is impaired by a host of procedural defects accompanying its enactment." The district court followed this with "The Michigan Supreme Court, however, resolved plaintiffs' procedural claims against them in *LeRoux* . . . and we do not address them here." (J.S. App. 4a).[6]

On May 24, 2002, the district court issued an order dismissing with prejudice five of Appellants' claims (those brought under Article I, the First Amendment, the Fourteenth Amendment's Privileges and Immunities Clause, the Fifteenth Amendment, and the Voting Rights Act). It dismissed without prejudice Appellants' vote dilution claim under *Davis v. Bandemer*, 478 U.S. 109 (1986), and granted Appellants leave to file an amended complaint in thirty days. Appellants filed their Second Amended Complaint on May 29, 2002. Accompanying that Complaint was a Motion for Expedited Trial, which requested that the district court commence trial on June 4, and requested that a decision be rendered by June 7, 2002. (J.S. App. 21a). Because Appellants again failed to allege facts that, if proved, would support a conclusion that the 2001 Plan is the product of unconstitutional political gerrymandering, the district court in its June 5, 2002 Order properly dismissed with prejudice Appellants' Second Amended Complaint.

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6. Appellants also make a number of factual assertions that are not contained in their pleadings and are not judicially cognizable. (*See, e.g.*, J.S. at 3 [comparing Michigan to Southern states]; *id.* [asserting the untrue statement, given Senator Spencer Abraham's victory in 1994, that Democrats prevailed in every senatorial election in Michigan in the last decade]; *id.* at 6 [referencing embarrassing news reports and motivation to minimize further adverse news coverage]; *id.* at 12 [asserting results of an expert witness' analyses]). Given the procedural posture of this case, these assertions must be ignored.

II. ARGUMENT

A. Appellants' Equal Protection Claims Should Be Dismissed For Lack Of Jurisdiction

1. Appellants' Vote Dilution Claim Is Not Justiciable

Intervening Defendants acknowledge that this Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), held that challenges to legislative reapportionment plans asserting vote dilution as a result of political gerrymandering were justiciable under the Equal Protection Clause. However, political gerrymandering claims do pose the real danger of drawing federal courts too far into the political thicket. *See Bandemer*, 478 U.S. at 133. Moreover, Intervening Defendants submit that *Bandemer*'s justiciability holding should not apply to claims challenging congressional districting plans. Because it is not justiciable, this Court does not have subject-matter jurisdiction over Appellants' vote dilution claim.

2. Appellants Do Not Have Standing To Challenge The 2001 Plan Under *Shaw v. Reno*

Appellants assert that they have a viable political gerrymandering claim under *Shaw v. Reno*, 509 U.S. 630 (1993). Even if such a claim exists under the Constitution, Appellants have no standing to challenge the entirety of the 2001 Plan.

Not all voters have standing to bring a *Shaw* claim. "Any citizen able to demonstrate that he or she, personally, has been injured by [the kind of racial classification described in *Shaw*] has standing to challenge the classification in federal court." *United States v. Hays*, 515 U.S. 737, 744 (1995). This means that plaintiffs may not challenge districts other than the one in which they reside without specific evidence that they "personally [have] been subjected to a racial classification." *Shaw v. Hunt*,

517 U.S. 899, 904 (1996). It follows that no individual voter has standing to bring a statewide challenge to a districting plan under *Shaw*. *See Hays*, 515 U.S. at 744 (rejecting the notion that "anybody in the State has a claim" under *Shaw*).

Appellants do not have standing to assert a *Shaw* claim, even if this Court concludes that *Shaw* is applicable to political gerrymandering claims. First, Appellants assert a statewide *Shaw* challenge to the 2001 Plan, (*see, e.g.*, J.S. at 23), even though under *Hays* and *Shaw v. Hunt*, no individual voter has standing to bring such a claim.

Second, Appellants have asserted facts that demonstrate they have no injury and therefore no standing. Thus, even if Appellants' complaint is interpreted to assert that the districts in which they allegedly reside were unconstitutionally defined,[7] this Court does not have jurisdiction over Appellants' claims. The *Shaw* Court, in describing the harms associated with racial gerrymandering, recognized that representatives of districts defined by race would believe that they needed to represent only a segment of their constituency, and not their constituency as a whole. 509 U.S. at 648. Appellants assert that political gerrymandering imposes the same sort of representational injury. (J.S. at 22). However, Appellants residing in the five alleged "safe" Democratic districts (J.S. App. 44a), or in the alleged competitive district (J.S. at 30), cannot suffer from this sort of injury. *See also Bandemer*, 478 U.S. at 140 ("It surely cannot be an actual disadvantage in terms of fair representation on a group level just to be placed in a district with a supermajority of other Democratic voters. . . ."). Those Appellants have no standing.

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7. Appellants reside in District 1, 5, 7, 9, 10, 11, 13, 14 or 15. No Appellant resides in District 2, 3, 4, 6, 8 or 12. (J.S. App. 27a-29a).

Moreover, Appellants allege in their Second Amended Complaint that "Members of Congress from Michigan respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved. . . ." (J.S. App. 47a). This negates any argument that any Appellant suffers the representational harms identified in *Shaw*. Thus, Appellants have alleged facts that defeat a showing that they have standing to bring a *Shaw* "political gerrymandering" claim, even if such a claim exists under the Constitution.

B. The District Court's Orders Should Be Summarily Affirmed

If this Court finds it has jurisdiction over Appellants' claims, it should summarily affirm the district court's judgments. The district court properly concluded that Appellants' complaints should be dismissed because Appellants failed to allege facts that would, if proved, lead to the conclusion that the 2001 Plan violates the Constitution. Because dismissal is dictated by *Bandemer* and other Supreme Court rulings, summary affirmance is warranted. This Court has viewed summary affirmance as the proper disposition of cases presenting substantially similar claims. *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *judgment aff'd*, 506 U.S. 801 (1992); *Anne Arundel Republican Central Committee v. State Admin. Bd.*, 781 F. Supp. 394 (D. Md. 1991), *judgment aff'd*, 504 U.S. 938 (1992); *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *judgment aff'd*, 488 U.S. 1024 (1989).

1. Appellants' Allegations Fail To Meet *Bandemer*'s Threshold

Appellants challenge the district court's dismissal of their *Bandemer* claim, contending that the court set a standard so high that no major party could ever demonstrate unconstitutional

political gerrymandering. (J.S. at 11). Because the district court plainly followed *Bandemer* and correctly dismissed Appellants' claim, its judgment should be summarily affirmed.

a. Allegations Of Disproportionate Representation Are Insufficient To State An Equal Protection Claim

Appellants take issue with the district court's ruling that, in addition to disproportionate representation, Appellants had to allege other harms from the 2001 Plan in order to state an equal protection claim. (J.S. at 2-3). The *Bandemer* plurality made clear that allegations of disproportionate representation, by themselves, are insufficient to make out an equal protection violation. *See* 478 U.S. at 132 ("[T]he mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."). Instead, additional "indicia" of "the lack of political power and the denial of fair representation" are required:

> In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. . . . In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears *in conjunction with similar indicia*.

Bandemer, 478 U.S. at 139-40 (emphasis added); *see also id.* at 143 n.21 ("[W]e do not share Justice O'Connor's apparent lack of faith in the lower courts' abilities to distinguish between disproportionality *per se* and the lack of fair representation that continued disproportionality *in conjunction with other*

indicia may demonstrate." (emphasis added)). In requiring that Appellants set forth allegations of effects beyond disproportionate representation, the district court followed *Bandemer*'s clear teaching.

Under *Bandemer*, the proper inquiry, which "is of necessity" a difficult one, 478 U.S. at 143, is whether the "electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. In order to state a claim, plaintiffs can allege, *in addition to disproportionate representation*, that elected candidates "will entirely ignore the interests of" voters casting their ballots for the losing candidate, *id.* at 132, that those voters "have no hope of doing any better in the reapportionment that would occur" after the next census, *id.* at 135-36; or other facts that support the conclusion that certain voters have been shut out of the political process. *Id.* at 139. These are the precise sorts of allegations that the district court granted Appellants leave to make in a future complaint. (J.S. App. 13a). No such additional indicia were alleged in their Second Amended Complaint. Because Appellants again failed to state an equal protection claim, the district court properly dismissed that complaint with prejudice. (J.S. App. 21a-22a).

b. Allegations Of "Extremely Disproportionate Results" Are Insufficient To State An Equal Protection Claim

Appellants contend that they have stated an equal protection claim, noting their complaints allege that the 2001 Plan "will generate extremely disproportionate results." (J.S. at 15). Thus, according to Appellants, they state an equal protection claim because they assert not only disproportionate representation, but "extreme" disproportionate representation.

Appellants allege that there are nine safe Republican seats in the 2001 Plan, and that Republican candidates can be expected to win nine, if not ten, of Michigan's fifteen seats. They do not point out that with fifteen seats, either Republicans or Democrats may be expected to win eight seats if the state is, as Appellants allege, a politically competitive state that has leaned Democratic or Republican depending on the decade or the election. Appellants' alleged "extremely disproportionate results" may thus translate to as few as one representative.[8]

But Appellants do not look at the number of representatives at issue in this case. Instead, they urge that *Bandemer* stands for the proposition that state legislatures may not consign a majority to minority status.[9] As a result, Appellants assert, a congressional districting plan that is predicted to result in one party's candidates winning fewer than 50% of the apportioned seats, even though that party receives more than 50% of the total statewide vote, is unconstitutional where the deviation between the two percentages is large enough, *i.e.*, where the plan does not reflect a "minor departure" from a "reasonable norm." (J.S. at 15-16).

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8. This is also indicated by Appellants' proffered alternative plans, two of which they suggest will result in eight Republicans and seven Democrats being elected. (J.S. App. 48a-49a).

9. Application of *Bandemer*'s focus on minority voice and minority status is a bit difficult in the context of congressional districting. While it may be argued that one of the concerns of the *Bandemer* plurality was that a party in power not relegate a majority of voters to minority status in a state legislative body, "minority status" in the U.S. House of Representatives necessarily depends on the votes of individuals in all fifty states, and thus is beyond the control of one state's legislature. As a result, even though after the 2000 elections Democrats comprised the majority of Michigan's congressional delegation, those Democrats are part of the minority in the House, as Republicans currently hold the majority of seats in that body.

What is large enough? Appellants suggest that because the difference between the seats and vote percentages they predict will occur under the 2001 Plan is larger than the difference that existed under the plan examined in *Bandemer*, the 2001 Plan is an example of the more egregious partisan gerrymandering that violates the Equal Protection Clause. (J.S. at 16). The plan examined in *Bandemer* resulted in an 8.9 percentage point difference between seats and statewide vote percentages (one party obtained 51.9% of the statewide vote and 43% of the seats). Under Appellants' view, nine seats for Republicans (and thus 40% of the fifteen seats for Democrats) means that the 2001 Plan is an example of unconstitutional political gerrymandering because Democrats are alleged to get more than 50% of the statewide vote. With more than 50% of the statewide vote, (*e.g.*, 51%) and with 40% of the seats, a difference greater than *Bandemer*'s 8.9 percentage points would result.

To accept Appellants' view would be to constitutionally require adoption of congressional districting plans that produce proportionate representation. For example, in a state apportioned three representatives in which Democrats receive (say) 51% of the statewide vote, a congressional districting plan would have to be declared invalid under Appellants' interpretation of *Bandemer* unless Democrats won two seats. This is because a Democratic candidate winning only one of three seats would yield a difference between the percentage statewide vote (51%) and the percentage of seats won (33.3%) of 17.7 percentage points — a difference much greater than *Bandemer*'s 8.9 percentage points. To avoid this result, the state's legislature would have to enact a plan that guaranteed to the extent possible that Democrats won two seats — a plan that limited the effect of forces, such as simple geography and the concentration of population in only a small corner of the state, that contribute to only one Democrat winning a congressional seat.

Thus, Appellants' argument is nothing more than a contention that the Constitution mandates proportionate representation, an argument this Court has repeatedly rejected. *See Bandemer*, 478 U.S. at 130 ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."). The district court's rejection of Appellants' arguments was proper and should be affirmed.

c. Appellants Seek To Avoid *Bandemer*'s High Threshold

In challenging the district court's dismissal of their equal protection claim, Appellants do not urge this Court to "enforce" *Bandemer*. Instead, Appellants seek to have this Court *lower* the standard defined in *Bandemer* so that a showing of disproportionate representation will make out a claim of unconstitutional political gerrymandering. (J.S. at 2-3 [criticizing lower courts' requirement that more than disproportionate representation be alleged and asserting that this requirement renders partisan gerrymandering "immune from legal challenge in actual practice"]).

The effect of accepting Appellants' contention is plain. Under Appellants' view, and given the alleged facts in this case, voters should be able to challenge successfully a legislatively enacted congressional districting plan even though

(1) their preferred political party has a "realistic possibility" of gaining control of the state's house and/or senate, and thus has the ability to affect whether a more favorable plan is enacted after the next census (J.S. App. 46a);

(2) their preferred political party does not lack political power in the state or in the nation as a whole;

(3) they have alternative means of influencing the political process (*e.g.*, they have two senators of their preferred party in Washington); and

(4) they have the "opportunity to influence" their elected representatives, *Bandemer*, 478 U.S. at 132, as those representatives are acknowledged to "listen to constituents' expressions of views regardless of the party affiliation of the constituent involved. . . ." (J.S. App. 47a).

In short, acceptance of Appellants' position will reduce *Bandemer*'s test to precisely what the *Bandemer* plurality explicitly rejected, *Bandemer*, 478 U.S. at 133 – a test that looks for any effect on a voter's opportunity to elect a representative of one's choice.

d. *Bandemer*'s Test Properly Limits Federal Court Involvement In States' Redistricting Decisions

This Court has long recognized that redistricting is an inherently political process, *Bandemer*, 478 U.S. at 129 n.10; *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); and that legislatures will inevitably consider political affiliation in drawing district lines, *Bandemer*, 478 U.S. at 128; *Gaffney* at 753 ("The reality is that districting inevitably has and is intended to have substantial political consequences."). That the party in power will commonly enact a plan that protects and even enhances its own position has also been recognized. *See Bandemer*, 478 U.S. at 164 (Powell, J. dissenting) ("The term 'gerrymandering' . . . is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls."). Given the inherently political nature of redistricting decisions, the *Bandemer* plurality set a high threshold for plaintiffs asserting

unconstitutional political gerrymandering. *See Bandemer*, 478 U.S. at 134 (noting that the effects of a challenged plan must be "sufficiently serious to require intervention by the federal courts"). The *Bandemer* plurality viewed its test as appropriate given the inherently legislative and political task of redistricting. *Id.* at 143 ("[W]e believe [our test] recognizes the delicacy of intruding on this most political of legislative functions. . . .").

The *Bandemer* plurality's "heightened effect" requirement, 478 U.S. at 142 n.19, serves a clear purpose: it limits the occasions on which federal courts are forced to scrutinize the districting decisions of state legislatures — decisions that this Court has repeatedly held are primarily for state legislatures, not the federal courts, to make. *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts."); *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) ("The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination.'" quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State . . . rather than of a federal court."); *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (recognizing that the primacy of state legislative districting decisions exists with respect to congressional districting as well). The *Bandemer* plurality's concern in rejecting as sufficient claims such as Appellants' was that

> such a low threshold for legal action would invite attack on all or almost all reapportionment statutes.

> District-based elections hardly ever produce a perfect fit between votes and representation. . . . Inviting attack on minor departures from some supposed norm would too much embroil the [federal] judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

Bandemer, 478 U.S. at 133-34.

The fact that few district courts applying *Bandemer* have found that plaintiffs state a claim of unconstitutional political gerrymandering is not, as Appellants assert, an indication that courts have undermined *Bandemer*'s holding.[10] It is, if anything, an indication that courts are being true to this Court's repeated admonition — in *Bandemer* and in other cases — that redistricting is an area into which courts should intrude only in the most serious of circumstances. Given this Court's recognition that politics and redistricting are inseparable, *see, e.g.*, *Gaffney*, 412 U.S. at 752, acceptance of Appellants' position would only work to involve courts in redistricting to an even greater extent than they are today.

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10. The Fourth Circuit in *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 958 (4th Cir. 1992), held that plaintiffs' complaint alleged facts sufficient to withstand a Rule 12(b)(6) motion. The Fourth Circuit noted that its decision was compelled by "the confluence of the alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina, and the certainty of a similar future," and stated its belief that "if [the Republican Party of North Carolina] had alleged even a modicum of electoral success or access to the political process, its claim might not have withstood a challenge under Rule 12(b)(6)." *Id.*

Because the district court properly dismissed Appellants' equal protection claim, its judgment should be affirmed.

2. *Shaw v. Reno* Is Inapplicable To Political Gerrymandering Claims

In a further attempt to avoid *Bandemer*'s heightened effect requirement, Appellants contend that principles announced in the racial gerrymandering cases of *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), are equally applicable to claims asserting political gerrymandering. Despite the Legislature's statements that it intended to follow (J.S. App. 77a) and did follow (Motion App. 37a) neutral redistricting criteria, Appellants urge that they have asserted an equal protection claim because they allege that the Michigan Legislature abandoned neutral redistricting criteria and deliberately drew lines on the basis of political party affiliation. (J.S. at 24). This Court's jurisprudence, including its decisions in *Shaw* and *Miller*, demonstrates conclusively that Appellants are mistaken: There is no viable "*Shaw*" political gerrymandering claim under the Equal Protection Clause. The district court properly rejected Appellants' contentions to the contrary.

a. *Shaw v. Reno* And *Miller v. Johnson*

In *Shaw*, this Court faced an assertion that the "deliberate segregation of voters into separate districts on the basis of race violated [appellants'] constitutional right to participate in a 'color-blind' electoral process." 509 U.S. at 641-42. The Court — and the appellants — recognized that those responsible for districting could be *conscious* of race, but ultimately the Court held that

> a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into

> different districts on the basis of race, and that the separation lacks sufficient justification.

Id. at 649. The Court agreed that redistricting legislation that is "unexplainable on grounds other than race" demands the strict scrutiny applied to other classifications on the basis of race. *Shaw*, 509 U.S. at 644. Underlying the Court's holding was the centrality of the Equal Protection Clause's prohibition on purposeful discrimination on the basis of race. *Id.* at 642.

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court described how this new "*Shaw*" claim might be made out. A plaintiff's burden, according to the *Miller* Court:

> is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.

Miller, 515 U.S. at 916. If a plaintiff makes this showing, strict scrutiny is applied and the burden shifts to the State to demonstrate that the legislation is narrowly tailored to achieve a compelling interest. *Id.* at 920.

b. There Is No *Shaw* Political Gerrymandering Claim

The principles laid out in *Shaw* and in *Miller* are inapplicable to Appellants' political gerrymandering claims. First, Appellants' claims are fundamentally vote dilution claims — as the district court noted, Appellants assert disproportionate representation "in abundance." As the *Miller* Court specifically noted, a *Shaw* claim is *not* a vote dilution claim:

> *Shaw* recognized a claim "analytically distinct" from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.

Miller, 515 U.S. at 911 (internal quotation marks and citations omitted); *see also Shaw v. Reno*, 509 U.S. at 649-50 ("Classifying citizens by race . . . threatens special harms that are not present in our vote dilution cases. It therefore warrants different analysis.").

Second, as classifications, race and political affiliation are not on the same footing. "Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their

membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. at 643 (internal quotations and citations omitted); *see also id.* at 648 (describing that representatives of districts defined by race would believe that they needed to represent only a segment of their constituency, and not their constituency as a whole as a harm associated racial gerrymandering). No such statement can be made with respect to classifications based on political party affiliation. *See Bandemer*, 478 U.S. at 132 ("[W]ithout specific supporting evidence, a court cannot presume . . . that those who are elected will disregard the disproportionately underrepresented group.").

Third, Appellants' assertion that unconstitutional political gerrymandering occurs when political factors predominate over "traditional districting principles" was rejected in *Bandemer*, 478 U.S. at 138 (rejecting the notion that "the intentional drawing of district boundaries for partisan ends *and for no other reason* violates the Equal Protection Clause in and of itself" (emphasis added)). Nothing in this Court's jurisprudence suggests that *Bandemer*'s conclusion has since been overturned.

In fact, although defining district lines on the basis of race forms the basis of a *Shaw* claim, defining district lines on the basis of political affiliation has been explicitly upheld by the Court. In *Gaffney*, 412 U.S. at 752, for example, the Court described that "virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties. . . ." Nonetheless, the Court held the challenged plans did not violate the Fourteenth Amendment. *Id.* at 752-53.

Finally, there is no support for Appellants' assertion that the strict scrutiny applicable to racial classifications under *Shaw* and *Miller* is also applicable to their political gerrymandering

claim. (J.S. at 22). The *Shaw* Court, made clear that strict scrutiny was *not* applicable in the political gerrymandering context:

> [N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, — would seem to compel the opposite conclusion.

Shaw, 509 U.S. at 650 (internal citations omitted); *see also Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny.").[11]

In short, this Court has not considered a legislature's classification on the basis of political party affiliation — even if it is the sole criterion in redistricting — to be a violation of the Fourteenth Amendment. There is no "*Shaw* political gerrymandering claim" under the Equal Protection Clause, and Appellants' arguments to the contrary should be rejected. The district court did precisely this, and as a result, its decision should be affirmed.

3. Article I Neither Prohibits Safe Districts Nor Mandates Political Neutrality

Appellants assert that the 2001 Plan is unconstitutional under Article I, but do not allege that the Plan fails to meet Article I, § 2's equality of population requirement.[12] Instead,

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11. Nowhere in *Gaffney* did the Court indicate that, given clear evidence of an intent to draw lines on the basis of political party affiliation, it was subjecting the challenged plans to strict scrutiny.

12. Fourteen of the 2001 Plan's fifteen districts have a population of 662,563; the last has a population of 662,562. (J.S. App. 78a).

they assert that voters have a cause of action under Article I, § 4, the Elections Clause, because Article I requires that state legislatures follow a principle of political neutrality in redistricting (J.S. at 29), and does not authorize states to enact plans that produce safe districts and that "frustrate[] the majority's will." (J.S. at 30). To support their argument, Appellants look to *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and *Cook v. Gralike*, 531 U.S. 510 (2001), cases that have nothing to do with redistricting or with claims of vote dilution.[13]

Appellants misinterpret Article I. First, as a grant of authority to states, the Elections Clause does not provide *voters* with rights not elsewhere protected. In both *U.S. Term Limits* and *Cook*, Article I, § 4 was raised by the state as a *defense* to plaintiffs' challenges, *i.e.*, the state asserted that Section 4 granted it the authority to undertake the challenged action. In neither case was Article I, § 4 the source of a constitutional right plaintiffs sought to protect.

Second, as Appellants acknowledge, (J.S. at 25), the Elections Clause authorizes the Michigan Legislature to enact statutes defining congressional districts and otherwise regulating congressional elections. *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that [the Elections Clause's] comprehensive words embrace authority to provide a complete code for congressional elections, ..."). This fact alone

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13. Appellants have not pointed to any aspect of the 2001 Plan that denies certain candidates access to the ballot, *U.S. Term Limits*, 514 U.S. at 836, or to any aspect of the Plan that is remotely equivalent to the provision struck down in *Cook*. *See Cook v. Gralike*, 531 U.S. at 528 (Kennedy, J., concurring) (describing the challenged provision as one that "handicap[s] those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred position on a certain issue").

distinguishes this case from *U.S. Term Limits* and *Cook*. In neither case was the state's action found to be a procedural regulation of congressional elections. *See U.S. Term Limits*, 514 U.S. at 832-35 (rejecting the contention that the challenged provision defining term limits was a regulation of the manner of elections); *Cook*, 531 U.S. at 523 (determining that the state constitutional provision at issue was "not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections").

Third, contrary to Appellants' contention, there is no constitutional mandate that state legislatures be blind to politics in congressional redistricting. In fact, this Court has explicitly recognized the impossibility of such a requirement:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Gaffney, 412 U.S. at 753. Because it is likely that the political impact of any plan will be known at the time it is adopted, the only way that a state could avoid Appellants' charge of unconstitutional political gerrymandering (or unconstitutional frustration of the will of the majority) is to ensure that only plans that result in proportionate representation are adopted. Again, Appellants' arguments reduce to an assertion — repeatedly rejected by the Court — that the Constitution mandates proportionate representation.

Moreover, as the *Bandemer* plurality recognized, ensuring proportionate representation *requires* consideration of political factors and the creation of safe seats:

> To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this 'political fairness' approach in *Gaffney v. Cummings*, despite its tendency to deny safe district minorities any realistic chance to elect their own representatives. But *Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.

Bandemer, 478 U.S. at 130-31. In short, ensuring proportionate representation requires consideration of political factors and the creation of safe seats (*i.e.*, the dictating of election outcomes) — the precise acts that Appellants urge the Constitution forbids in the redistricting context.

Appellants' assertion that Article I requires something close to an absolute political neutrality standard is thus baseless.[14] The Constitution imposes no "political neutrality" mandate on congressional districting. This Court recognized in *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Hunt I*"), that "constitutional political gerrymandering" (*i.e.*, that which was valid under *Bandemer*) was a traditional race-neutral principle

14. Under the test set forth in *Karcher v. Daggett*, 462 U.S. 725 (1983), questions regarding what a state legislature considered in adopting a congressional districting plan are raised *only* if Article I, § 2's population equality standard is *not* met. *Id.* at 730-31. Thus, if, as here, that standard *is* met, Article I is *indifferent* to the criteria, including political party affiliation, that the legislature may have applied.

that could be applied in fashioning congressional districts.[15] Nor does the Constitution forbid, under *U.S. Term Limits*, the legislature's creation of safe seats. *See, e.g., Hunt v. Cromartie*, 532 U.S. 234 (2001) ("*Hunt II*") (upholding congressional districting plan in which legislature intentionally created a strong Democratic district).

This Court has had numerous opportunities to restrict a state legislature's consideration of political factors in redistricting in the manner that Appellants advocate. It has not done so. This Court has not identified a constitutional mandate that state legislatures employ only "traditional districting principles" in fashioning congressional districts or otherwise concern themselves with only "neutral" considerations. Instead, it has emphasized that such criteria themselves are not constitutionally required. *See, e.g., Shaw v. Reno*, 509 U.S. at 647 (listing "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" and emphasizing that these criteria are *not* constitutionally required).

Indeed, a directive that states adhere to only neutral criteria would be nearly impossible to follow given "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 752. Courts would be faced with challenges to nearly every congressional districting plan, with each set of plaintiffs contending that politics entered into decision making to a degree that exceeds the departure from political neutrality allowed by Article I. In short, the result the *Bandemer* plurality attempted to avoid would be obtained:

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15. The Framers authorized Congress to override states' regulations. *U.S. Term Limits*, 514 U.S. at 808 ("[T]he Framers created a safeguard against state abuse by giving Congress the power to 'by Law make or alter such Regulations'."). Congress has imposed neither requirements nor limitations on the political factors states may use in congressional districting. *See* 2 U.S.C. § 2c.

> Inviting attack on minor departures from some supposed norm would too much embroil the [federal] judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

Bandemer, 478 U.S. at 133-34.

The district court properly dismissed Appellants' Article I claim. That result is correct under this Court's jurisprudence, and should be affirmed.

III. CONCLUSION

For the foregoing reasons, this Court should dismiss Appellants' appeal for lack of jurisdiction, or, in the alternative, summarily affirm the district court's dismissal of Appellants' equal protection and Article I claims.

Respectfully submitted,

MICHAEL A. CARVIN
JONES, DAY, REAVIS & POGUE
51 Louisiana, NW
Washington, D.C. 20001
(202) 879-3939

PETER H. ELLSWORTH
Counsel of Record
JEFFERY V. STUCKEY
SUSAN G. SCHWOCHAU
DICKINSON WRIGHT PLLC
215 S. Washington Square
Suite 200
Lansing, MI 48933
(517) 371-1730

Attorneys for Intervening Defendants/Appellees

APPENDIX

APPENDIX A — MAP OF MICHIGAN'S 15 CONGRESSIONAL DISTRICTS 2001 Apportionment Plan

MICHIGAN'S 15 CONGRESSIONAL DISTRICTS

2001 Apportionment Plan

Produced by
Michigan Information Center
October 2001

APPENDIX B — AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN FILED SEPTEMBER 20, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants.

AMENDED COMPLAINT

1. The plaintiffs — Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith — have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As registered Democrats in the

State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates Article I's requirement that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several States," as well as the First, Fourteenth, and Fifteenth Amendments. The congressional redistricting plan also improperly dilutes the power and influence of African-American voters in violation of the Voting Rights Act.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road, Northville, Michigan 48167. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

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4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

Appendix B

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

I. *The Republicans Violated State Law In Order to Pass A Partisan Gerrymander.*

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich Const., art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the

session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich Const, art 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich Const., art. 4, § 24). The Legislature's willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down

the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.* The complete text of the statute is attached as Ex. A.

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. Unlike the Republican Plan which pairs six Democratic incumbents in three districts, this plan does not pair in the same district any incumbents seeking reelection and more accurately reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents — eight Democrats and seven Republicans — are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

Appendix B

19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.
>
> (ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.
>
> (iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did

not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the non-partisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrates that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting criteria in the same legislation as a redistricting plan, without re-publication of existing redistricting criteria, violates Michigan's constitutional rules, set forth above, against amendment by reference and inclusion of two subjects in the same law.

II. *The Republicans Were Unwilling To Subject Their Redistricting Plan To Public, Or Legislative, Deliberation.*

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity

for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistrict-ing plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity. In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective

guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have

until noon, Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension — until noon on June 25 — for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 — *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers. Since these

data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation — and analysis of the Republican Plan by the public or by Democrats — through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers — a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could he analyzed, the thousands of

block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in two major mistakes that were not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties — and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members

on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight party-line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 — not a time when public scrutiny or rigorous debate was likely to occur. At roughly 2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

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36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand, five hundred seventy-eight (4,578) people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error — one unpopulated census tract was not placed in any district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: present the Republican Plan to the Governor despite the blatant error, correct the error herself, or wait until the Legislature returned in September and then send the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12. That rule states that, "[i]f errors are found in a bill which has

been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add more than four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar — but lesser — problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 11, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and presented it to the Governor. The Governor signed the bill containing the Republican Plan at 4:54 p.m. on Tuesday, September 11, 2001. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan

because they had already agreed internally on that plan and felt no need for input from Democrats or from the public. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

III. *The Republican Plan is Severely Biased Against Democrats.*

42. In general, Michigan is a politically competitive State that leans Democratic in federal elections. Michigan has voted for the Democratic candidate for President in each of the last three presidential contests, with the Republican candidate twice failing to capture even 40% of the statewide vote. Both of its U.S. Senators are Democrats. At present, nine of Michigan's sixteen Representatives are Democrats.

43. The current makeup of Michigan's congressional delegation is not an artifact of any bias in the current congressional districting plan. The current districts were drawn in 1992 by a federal district court of three judges — Sixth Circuit Judge Ryan and District Judges Newblatt and Bell. *See Good v. Austin*, 800 F. Supp. 551(E.D. & W.D. Mich. 1992). In the most recent elections conducted under that plan, in November 2000, the Democratic congressional candidates received nearly 400,000 more votes than their Republican opponents (54.8% to 45.2% of the major-party vote) and that closely approximates the number of congressional seats they control (9 out of 16 seats is 56.3%).

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44. The Michigan electorate has been trending Democratic in recent years. In 1996, Democrats carried the statewide congressional vote by seven percentage points (53.5% to 46.5%). In the 2000 elections, the margin was more than nine percentage points. In 1996 and 2000, the Democratic presidential candidates won by nearly five points more in Michigan than elsewhere in the country. In contrast, in 1984 and 1988, the Republican presidential candidates had won Michigan and had done so by larger margins than they did nationwide.

45. Despite the increasingly Democratic nature of the Michigan electorate in national elections, under the Republican Plan, Republicans are very likely to win nine or even ten of the fifteen congressional seats. This is apparent from analyzing the results of past elections based on the districts drawn in the Plan. Democratic presidential candidate Al Gore carried Michigan by approximately five points statewide. Thus, in a non-partisan redistricting plan, Al Gore would have carried slightly over half the congressional districts. Yet Republican presidential candidate George W. Bush carried ten of the fifteen congressional districts drawn in the Republican Plan. This is because the maximum number of Democrats were packed into just five districts — each of which Al Gore carried by at least 23 points. In contrast, under the court-drawn congressional districting plan put in place in 1992 ("the 1992 Plan"), Al Gore carried ten of sixteen congressional districts, far more accurately reflecting the percentage of the statewide vote that he won.

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46. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan — not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan — a result consistent with her narrow victory statewide.

47. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

48. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the homes of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents — an odd result in a State that is losing one congressional seat to reapportionment.

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49. In contrast, two nonpartisan plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The first plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

50. The Democrats introduced a second redistricting plan that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan, using the Republicans' unique method of counting. This plan is not partisan, however. It pairs four incumbents — two Democrats in one district and two Republicans in another — in contrast to the six Democrats and zero Republicans paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

51. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS*, in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

IV. *The Republican Plan Dilutes The Voting Strength of African-American Citizens.*

52. In addition to its excessive partisanship, the Republican Plan also limits the power and influence of Michigan's one million four hundred twelve thousand African-American citizens. Outside of Wayne County, blacks in Michigan would not reside in a majority-black district under any redistricting plan but they could still have significant impact on congressional elections. However, because blacks in Michigan tend to vote as a bloc and strongly favor Democrats and because whites in Michigan tend to vote as a bloc, blacks can only have significant impact on the nomination and election of a congressman or congresswoman if (1) they reside in a competitive or Democratic-leaning district, and (2) there is a relatively high concentration of blacks among Democratic primary voters.

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53. Outside of Detroit, three of the cities with the highest number of blacks are Pontiac, Grand Rapids, and Lansing. Under the Republican Plan, each of these cities is placed in a strongly Republican district and also is isolated from other cities with a significant black population. Under the Kilpatrick substitute, however, each of these three cities is placed in a competitive or Democratic-leaning district.

54. Finally, because blacks in Michigan vote overwhelmingly for Democrats in congressional elections, the substantial diminution in Democratic strength under the Republican Plan inherently dilutes the ability of black voters to participate in the political process and to elect candidates of their choice to Congress.

CLAIM I

55. Plaintiffs incorporate by reference Paragraphs 1 through 54.

56. The facts herein alleged constitute a denial or abridgement of each plaintiff's right to vote for his or her Representative to the United States Congress, in violation of Sections 2 and 4 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment.

CLAIM II

57. Plaintiffs incorporate by reference Paragraphs 1 through 54.

58. The facts herein alleged constitute a denial of the plaintiffs' freedoms of speech and association in violation of the First Amendment to the United States Constitution.

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CLAIM III

59. Plaintiffs incorporate by reference Paragraphs 1 through 54.

60. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

61. Plaintiffs incorporate by reference Paragraphs 1 through 54.

62. The facts herein alleged constitute an abridgment of the privileges and immunities of citizenship guaranteed to plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM V

63. Plaintiffs incorporate by reference Paragraphs 1 through 54.

64. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed to them by Section I of the Fifteenth Amendment to the United States Constitution.

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CLAIM VI

65. Plaintiffs incorporate by reference Paragraphs 1 through 54.

66. The facts herein alleged constitute a deprivation of plaintiffs' constitutional rights that is actionable under Section 1983 of Title 42 of the United States Code.

CLAIM VII

67. Plaintiffs incorporate by reference Paragraphs 1 through 54.

68. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed them by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three-judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Set a deadline of April 1, 2002, pursuant to the principles of federalism and comity set forth in *Growe v. Emison*, 507 U.S. 25, 32-37 (1993), and consistent with the April 1, 2002, deadline established by Michigan law, Mich. Comp. Laws § 3.74(g), for the Michigan Supreme Court to adjudicate any challenges to the Michigan congressional redistricting plan;

C. If the Supreme Court of Michigan fails to adopt a new, legally valid congressional redistricting plan by that April 1,

2002 deadline, enter a declaratory judgment that the congressional districting plan enacted in the summer of 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

D. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

E. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

F. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

G. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING LLP

By: s/ R. Craig Hupp
F. Thomas Lewand (P16619)
R. Craig Hupp (P36254)
William B. Forrest III (P60311)
100 Renaissance Center # 3400
Detroit, MI 48243
Attorneys for Plaintiffs

APPENDIX C — MICHIGAN BILL TEXT
HOUSE CONCURRENT RESOLUTION NO. 34

JOURNAL OF THE HOUSE [July 10, 2001]

By unanimous consent the House returned to the order of
Motions and Resolutions

Rep. Patterson offered the following concurrent resolution:
House Concurrent Resolution No. 34

A concurrent resolution to explain and urge the Governor to support and sign Senate Bill No. 546.

Whereas, During the last decade, Michigan's population grew by 643,147 people, an increase of approximately seven percent. Despite Michigan's population growth, the 2000 decennial census has resulted in Michigan being apportioned fifteen congressional seats for the next ten years, one fewer than ten years ago. Based on Michigan's population of 9,938,444, the ideal size of each congressional district is 662,563. This is an increase of 81,600 people from the ideal district size in the current congressional districting plan. In addition to a change in overall population, during the last decade, significant demographic shifts occurred in the state. Perhaps the most significant of these shifts was the continued loss of population in the City of Detroit and certain inner-suburban areas. Detroit alone lost over 75,000 people. At the same time, the outer suburbs of the Detroit metropolitan area and much of the Northern Lower Peninsula experienced significant growth. As a result of these changes, Michigan's congressional districts for the next decade must change as well. Senate Bill No. 546 establishes new congressional districts for the State of Michigan; and

Appendix C

Whereas, In 1999, the Legislature enacted statutory criteria to be applied in redistricting Michigan's congressional districts (1999 PA 221). These criteria incorporate the federal constitutional requirement of precise mathematical equality of population in each district. They also require compliance with section 2 of the federal Voting Rights Act. As "secondary" state criteria, 1999 PA 221 requires, in descending order of priority, that congressional districts (1) shall break as few county boundaries as reasonably possible, (2) shall break as few city or township boundaries as reasonably possible, and (3) within a city or township to which there is apportioned more than one congressional district, districts shall be as compact as possible. (The third secondary criterion is inapplicable in the current redistricting cycle because no Michigan city is large enough to encompass more than one congressional seat); and

Whereas, The secondary criteria established for congressional redistricting are similar to the criteria utilized by the Federal District Court when it drew Michigan Congressional districts in 1992 (*Good v Austin*, 800 F Supp 551 (1992)). They are also similar to the so-called "Apol Criteria" utilized by the Michigan Supreme Court for redistricting the Michigan Legislature in 1982 and 1992. The Apol Criteria were enacted into law in 1996 for use in state legislative redistricting. Among other things, they effectuate a long-standing state constitutional policy of preserving county and, to a lesser extent, city and township boundary lines in the redistricting of the state Legislature. While this constitutional policy is not directly applicable to congressional districting, the Legislature nevertheless adopted it as a statutory policy for congressional districts; and

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Whereas, Unlike the Apol Criteria, which require the fewest possible breaks in county and municipal lines, the congressional redistricting criteria require only that district lines break as few county, city, and township boundary lines "as is reasonably possible." The reason for this difference is that federal courts have held that population deviations of up to 10% between state legislative districts to achieve legitimate state goals are presumptively valid. This flexibility — as distinguished from the requirement of precise mathematical equality for congressional districts — better enables the achievement of the fewest possible breaks in a redistricting plan for the Legislature; and

Whereas, Except within cities apportioned more than one congressional seat (and there are currently none), compactness is not a requirement. As the Michigan Supreme Court observed in its 1982 state redistricting decision, compactness is not an end in itself but rather a means of avoiding political gerrymandering (*In Re Apportionment* — 1982, 413 Mich 96, 134 (1982)). Requiring preservation of county, city, and township boundary lines effectively achieves the same anti-gerrymandering purpose. Furthermore, use of counties, cities, and townships as the basic building blocks for districts helps assure reasonable spatial uniformity among districts (*In Re Apportionment* — 1982, 413 Mich 133); and

Whereas, The statutory criteria for congressional redistricting are set forth in MCL § 3.63. They are as follows:

> Except as otherwise required by federal law for congressional districts in this state, the redistricting plan shall be enacted using only these guidelines in the following order of priority:

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(a) The constitutional guideline is that each congressional district shall achieve precise mathematical equality of population in each district.

(b) The federal statutory guidelines in no order of priority are as follows:

(i) Each congressional district shall be entitled to elect a single member.

(ii) Each congressional district shall not violate section 2 of title I of the voting rights act of 1965, public Law 89-110, 42 U.S.C. 1973.

(c) The secondary guidelines in order of priority are as follows:

(i) Each congressional district shall consist of areas of convenient territory contiguous by land. Areas that meet only at points of adjoining corners are not contiguous.

(ii) Congressional district lines shall break as few county boundaries as is reasonably possible.

(iii) If it is necessary to break county lines to achieve equality of population between congressional districts as provided in subdivision (a), the number

of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(iv) Congressional district lines shall break as few city and township boundaries as is reasonably possible.

(v) If it is necessary to break city or township lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(vi) Within a city or township to which there is apportioned more than 1 congressional district, district lines shall be drawn to achieve the maximum compactness possible.

(vii) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.

(viii) If a discontiguous township island exists within an incorporated city or discontiguous portions of townships

are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:

(A) The city must be split to achieve equality of population between congressional districts as provided in subdivision (a) and it is practicable to keep the township together within 1 district.

(B) A township island is contained within a whole city and a split of the city would be required to keep the township intact.

(C) The discontiguous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.

(ix) Each congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state.

; and

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Whereas, In determining the number of county breaks in a proposed plan, the House and Senate utilized the same methodology that the Supreme Court utilized in redistricting the Legislature in 1982 and 1992. This methodology is set forth in publicly available correspondence between the Supreme Court and its special master for the 1982 plan and in footnote seven of the concurring opinion of Justices Levin and Fitzgerald in the 1982 redistricting case (*In Re Apportionment* — 1982, 413 Mich 96, 155, n.7.) That methodology for determining county breaks is as follows:

> 1. Breaking a county line means assigning part of the population of a county to one or more other counties in the formation of a district.
>
> 2. If population is shifted from a county to a single election district (even if it comes from two geographically-separate whole cities or townships), that counts as one break. However, if population from that county is shifted to two or more election districts, that counts as two or more breaks.
>
> 3. A subsidiary rule (an exception) is that if one part of a county is shifted to one district and all the rest of the county is shifted to another district, that counts as one break.

; and

Whereas, The number of municipal breaks was determined by essentially the same methodology:

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1. Breaking a municipal line means assigning part of the population of a municipality to one or more other municipalities or counties in the formation of a district.

2. If population is shifted from a municipality to a single election district, that counts as one break. However, if population from that municipality is shifted to two or more election districts, that counts as two or more breaks.

3. A subsidiary rule (an exception) is that if one part of a municipality is shifted to one district and all the rest of the municipality is shifted to another district, that counts as one break.

4. If the boundary of a city which is located in more than one county, is broken in order to preserve a county boundary, that does not count as a municipal break.

; and

Whereas, The United States Supreme Court has observed that districting solely to achieve population equality "may be little more than an open invitation to partisan gerrymandering" (*Reynolds v Sims*, 377 US 533, 578 (1969)). The secondary criteria requiring the preservation of political subdivision boundaries to the extent reasonably possible substantially limits discretionary decision-making, and thus limits the opportunities for political gerrymandering; and

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Whereas, Decennial census data became available in Michigan on March 28, 2001. Creation of a redistricting plan requires 2000 Census population data and 2000 Census geography, known as TIGER/Line files. All of this data has been made publicly available by both the Michigan Information Center and the United States Census Bureau from the date it was received by the state. Interested citizens and members of the Legislature have had since that date the opportunity to draft redistricting plans consistent with the statutory criteria; and

Whereas, On June 8, 2001, the Majority Leader of the Senate and the Speaker of the House announced the likelihood that redistricting legislation would be taken up before the summer recess. They asked that proposed plans and comments be submitted to the Secretary of the Senate and the Clerk of the House of Representatives not later than June 18, 2001. On June 20, 2001, that deadline was extended to June 25, 2001; and

Whereas, The Senate Committee on Redistricting held a committee hearing on June 25, 2001. After entertaining public comment, Senate Bill No. 546 was reported favorably with substitute (S-2) to the Senate floor. The Senate thereafter passed Senate Bill No. 546; and

Whereas, Senate Bill No. 546 was referred to the House Committee on Redistricting and Elections. The House Committee on Redistricting and Elections held a committee hearing on July 10, 2001. After entertaining public comment, the Committee reported Senate Bill No. 546 favorably; and

Appendix C

Whereas, The plan recommended by the House Committee on Redistricting and Elections for the United States House of Representatives consists of 15 single member districts comprised of convenient territories contiguous by land. The population of each district is 662,563; the number of breaks in county boundaries is 11; the number of breaks in city and township lines is 14. This is the plan which is most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature; and

Whereas, This redistricting plan was designed to comply fully with both section 2 of the Voting Rights Act and the requirements of the Fourteenth Amendment's equal protection clause, as set forth in *Shaw v Reno*, 509 US 630 (1993) and subsequent cases concerning racial gerrymandering. Aware of these dual obligations, this plan avoids any practice or district lines which result in the denial of any racial or ethnic group's equal opportunity to elect a representative of their choice and, at the same time, does not subordinate traditional redistricting principles for the purpose of accomplishing a racial gerrymander or creating a majority-minority district. As a consequence, the plan does not result in retrogression or dilution of minority voting strength, particularly in light of the demographic limitations caused by relative population losses and the neutral criteria set forth in MCL § 3.63. On the other hand, the plan does not sacrifice traditional neutral principles, such as, most importantly, preservation of county and municipal boundaries, for the purpose of engaging in a gerrymander that unnecessarily favors one racial group over others; and

Appendix C

Whereas, The plan furthers the underlying purpose of the state constitution by facilitating effective representation in the Congress where elected representatives can advance the shared interests of unified municipalities or counties. It does so without sacrificing Voting Rights Act principles, equal electoral opportunities, or racial fairness; now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That we urge the Governor to support and sign Senate Bill No. 546; and be it further

Resolved, That a copy of this resolution be transmitted to the Office of the Governor.

The resolution was referred to the Committee on Redistricting and Elections.